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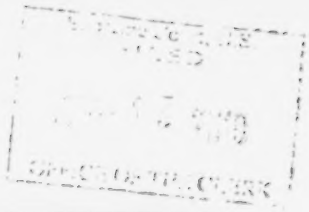

No. 09-920

In the Supreme Court of the United States

PAUL SIMMONS, ET AL., PETITIONERS

v.

WILLIAM FRANCIS GALVIN, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973, applies to state felon disenfranchisement laws that result in discrimination on the basis of race.

2. Whether the Massachusetts felon disenfranchisement scheme established in 2000 violates the Ex Post Facto Clause of the United States Constitution as applied to those Massachusetts felons who were incarcerated and yet were able to vote prior to 2000.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Until 2000, incarcerated felons were permitted to vote by absentee ballot in elections in the Commonwealth of Massachusetts. In 2000, the state legislature approved a proposal to amend the state constitution to forbid incarcerated felons from voting. Pet. App. 3a-4a. The proposed amendment, Article 120, was submitted to Massachusetts voters along with a voter guide explaining the rationale underlying the proposal:

> When someone in Massachusetts is sentenced to jail for committing a felony, we deprive them of their

> liberty and right to exercise control over their own lives, yet current law allows these same criminals to continue to exercise control over our lives by voting from prison. This amendment will change the law that gives jailed criminals the right to vote.

Id. at 4a.

Massachusetts voters approved Article 120 by a 60.3% vote, and the amendment took effect on December 6, 2000. Pet. App. 5a. As amended, the Massachusetts Constitution provides that "[e]very citizen of eighteen years of age and upwards, *excepting persons who are incarcerated in a correctional facility due to a felony conviction*, and excepting persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections * * * shall have a right to vote" in certain state elections. *Id.* at 6a (quoting Mass. Const. Amend. Art. III).

The following year, the Massachusetts legislature extended the ban on voting by incarcerated felons in Chapter 150 of the Acts of 2001. Under Chapter 150, the voting ban applies to all elections in Massachusetts. Pet. App. 6a; see 2001 Mass. Acts ch. 150, 375.

2. In 2001, petitioners, who are Massachusetts residents serving terms of imprisonment following convictions for felonies committed before Article 120's effective date, filed suit challenging Article 120, as well as its extension in Chapter 150. Pet. App. 6a-7a.

Petitioners claimed, among other things, that Article 120 violates Section 2 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. 1973. Section 2(a) of the VRA, as amended in 1982, prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on

account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a); see 42 U.S.C. 1973b(f)(2). Section 2(b), which was added in 1982, provides that Section 2(a) is violated when, "based on the totality of circumstances, it is shown that * * * members of a class of citizens protected by [Section 2(a)] * * * have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b). Petitioners alleged that Article 120 violates Section 2 because it "has a disproportionately adverse effect on the voting rights of African-Americans and Hispanic-Americans" that "is caused by, among other things, the facts that African-Americans and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons, and that there exists considerable racial and ethnic bias, both direct and subtle, in the Massachusetts court system." Second Am. Compl. ¶ 51; see Pet. App. 6a.

Petitioners also alleged that Article 120 was a "punitive measure" that violated the Ex Post Facto Clause, U.S. Const. Art. I, § 10, as applied to convicted felons who committed their offenses before Article 120's effective date. Pet. App. 10a.

3. The district court denied the Commonwealth's motion for judgment on the pleadings with respect to petitioner's VRA claim, but granted summary judgment in favor of the Commonwealth on petitioners' Ex Post Facto claim. Pet. App. 108a-152a.

With respect to petitioners' VRA claim, the district court reasoned that Section 2(a) of the VRA "expressly covers all voting qualifications without any stated (or suggested) exemption for felon disenfranchisement laws." Pet. App. 137a-138a. The court further con-

cluded that petitioners had adequately alleged that "racial bias in the court system exists and has interacted with other cognizable factors to render the disenfranchisement of incarcerated felons in Massachusetts unlawful under the VRA." *Id.* at 151a.

The district court concluded, however, that petitioners' Ex Post Facto claim failed because Article 120 does not retroactively impose an additional penalty for crimes they committed before the constitutional amendment was passed. Pet. App. 117a-129a.

4. The court of appeals reversed the district court's denial of the Commonwealth's motion for judgment on the pleadings as to the VRA claim, but affirmed the district court's grant of summary judgment in favor of the Commonwealth on the Ex Post Facto claim. Pet. App. 1a-49a.

Noting that "Article 120 is among the narrowest of state felon disenfranchisement provisions" because it prevents only currently incarcerated felons from voting, Pet. App. 13a, the court of appeals concluded that it is "clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons," *id.* at 3a.

The court of appeals began by noting that "the state's denial of the right to vote to felons has a constitutional grounding" in Section 2 of the Fourteenth Amendment, Pet. App. 16a, which provides for reduced representation when a State denies or abridges the right to vote, "except for participation in rebellion, or other crime," U.S. Const. Amend. XIV, § 2. Petitioners, the court noted, "make no allegation of intentional discrimination, and * * * allege no constitutional violation" under the Equal Protection Clause. Pet. App. 17a.

The court of appeals rejected petitioners' argument that the plain text of Section 2 reached their claim. The court considered it "neither plain nor clear" that the disenfranchisement of incarcerated felons is properly understood as "'resulting' in a denial 'on account of race or color'" within the meaning of Section 2(a), as opposed to "on account of imprisonment for a felony." Pet. App. 23a. The court then held that Section 2(b), which sets forth the test for determining when a Section 2 violation "is established," 42 U.S.C. 1973(b), affirmatively "undercuts" petitioners' Section 2 claim. Pet. App. 36a. The court explained that Section 2(b) "protects a 'class of citizens' who by law may and should enjoy as full an 'opportunity [as] other members of the electorate to participate in the political process,'" *ibid.* (quoting 42 U.S.C. 1973(b)), whereas, "[f]or a host of valid reasons, incarcerated prisoners cannot participate in the political process equally with free citizens outside the prison walls," *id.* at 36a-37a.

The court of appeals also noted that Congress enacted the VRA "against the background of explicit constitutional and congressional approval of state felon disenfranchisement laws," Pet. App. 25a (footnote omitted), and that congressional action both before and after the 1982 amendments suggested congressional acceptance of those laws, *id.* at 30a-32a, 37a-38a. In light of that history, the court concluded that Congress did not intend the VRA to "reach the disenfranchisement of currently incarcerated felons." *Id.* at 33a.

Having reached that conclusion, the court of appeals declined to address "what is needed to prove a denial * * * claim under § 2 which is not a claim against a state provision disenfranchising imprisoned felons." Pet. App. 39a-40a; see *id.* at 41a ("[T]his is not the case

in which to test the standards for other types of purported direct disenfranchisement claims."). The court also noted that "[i]t is doubtful plaintiffs have articulated a viable § 2 direct denial theory, in any event," since "[t]he most [petitioners] have suggested is that * * * there may be some causal connection between being incarcerated for felonies and their race," but petitioners had provided no support for that proposition after several years of litigation. *Id.* at 39a n.23.

Turning to the Ex Post Facto claim, the court concluded that Article 120 was intended as a "civil regulatory scheme," rather than as punishment for crime. Pet. App. 44a. The court noted that Article 120's language, nature, and placement in the State's civil voter qualification provisions, rather than its criminal code, all indicate that Article 120 was intended as a civil regulation, rather than a criminal penalty. *Id.* at 44a-45a. After considering the factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), the court concluded that petitioners had failed to meet their burden of establishing by "the clearest proof" that Article 120 is "so punitive either in purpose or effect as to negate that intention." Pet. App. 45a (internal quotation marks and citations omitted); *id.* at 46a-48a.

Judge Torruella dissented. Pet. App. 50a-107a. In his view, the court erred in ordering dismissal of petitioners' VRA claim because the "felon disenfranchisement provision at issue is clearly a 'voting qualification'" within the meaning of Section 2, and "[w]hether or not this provision results in the denial of the right to vote 'on account of race or color' under the 'totality of the circumstances' remains the ultimate question for the trier of fact." *Id.* at 53a. Judge Torruella also criticized the court's reliance on "assorted evidence of the widespread

use and general sanction of felon disenfranchisement laws in various contexts," noting that none of the evidence supports the conclusion that "Congress intended to insulate such laws from scrutiny under § 2 of the VRA where they are alleged to effect a discriminatory result." *Id.* at 66a. Finally, Judge Torruella concluded that Article 120 is punitive, and thus violates the Ex Post Facto Clause. *Id.* at 77a-107a.

DISCUSSION

Neither of the questions presented warrants this Court's review. There is no conflict between the court of appeals' decision and final decisions from other circuits. With respect to the first question presented, while the decision is in tension with a recent decision of the Ninth Circuit, the Ninth Circuit has granted en banc review in that case. At least until the en banc Ninth Circuit has had the opportunity to rule, this Court's intervention would be premature. Moreover, the court of appeals correctly held petitioners' challenge to Article 120, a law that disqualifies only currently incarcerated felons from voting, is not actionable under Section 2. Finally, the limited scope of the disqualification at issue renders this case an unsuitable vehicle for considering Section 2's application to other, more restrictive, state felon disenfranchisement laws.

With respect to the second question presented, the court of appeals properly applied this Court's well-established framework for evaluating Ex Post Facto claims. Further review is unwarranted.

A. The VRA Question Does Not Warrant This Court's Review

With the passage of Article 120 in 2000, Massachusetts joined 47 other States that restrict voting by per-

sons convicted of felony offenses. Article 120, which applies only to presently incarcerated felons, is, as the court of appeals observed, "among the narrowest of state felon disenfranchisement provisions." Pet. App. 13a. Approximately two-thirds of the States disenfranchise felons both while they are incarcerated and while they are on parole, probation, or both. *Ibid.* Still other States prohibit felons from voting for life. *Ibid.*

The court of appeals in this case did not opine on these other, more restrictive, felon disenfranchisement laws. It instead concluded only that petitioners' challenge to Massachusetts's narrow disqualification provision was not actionable under Section 2. That conclusion does not warrant further review.

1. To date, the court below is the only court of appeals that has squarely addressed the cognizability of a Section 2 challenge to a state felon disenfranchisement law that applies only to currently incarcerated prisoners. The Second and Eleventh Circuits, however, have both held that Section 2 does not apply to more restrictive felon disenfranchisement laws. See *Hayden* v. *Pataki*, 449 F.3d 305, 314, 329 (2d Cir. 2006) (en banc) (rejecting Section 2 challenge to a statute disenfranchising both "currently incarcerated prisoners and parolees"); *Johnson* v. *Governor of Fla.*, 405 F.3d 1214, 1216 & n.1 (11th Cir.) (en banc) (rejecting Section 2 challenge to a statute disenfranchising felons during the period of incarceration and "until restoration of civil rights or removal of disability," brought by individuals who were "convicted of a felony and have completed all terms of their incarceration, probation, and parole"), cert. denied, 546 U.S. 1015 (2005); see also *id.* at 1234 n.40 (expressing concern that "states might lose their ability to ex-

clude felons currently in prison from the franchise" under a contrary reading of the statute).

The Ninth Circuit, on the other hand, held in *Farrakhan* v. *Washington*, 338 F.3d 1009 (2003) (*Farrakhan I*), cert. denied, 543 U.S. 984 (2004), that Section 2 applies to a Washington statute disenfranchising felons both during the period of incarceration and "until they have completed all the requirements of their sentences and have obtained certificates of discharge." *Id.* at 1012, 1016. The court denied a rehearing petition over the objection of seven judges, 359 F.3d 1116 (2004) (Kozinski, J., dissenting from denial of rehearing), and the case was remanded to the district court for further consideration.

On remand, the district court granted summary judgment in favor of the State. *Farrakhan* v. *Gregoire*, No. CV-96-076, 2006 U.S. Dist. LEXIS 45987, at *28-*29 (D. Wash. July 7, 2006). A divided panel of the Ninth Circuit reversed. Considering itself "bound by *Farrakhan I's* holding that § 2 of the VRA applies to Washington's felon disenfranchisement law," the court invalidated the law based on plaintiffs' showing that "racial minorities are over-represented in the felon population based upon factors that cannot be explained by non-racial reasons." *Farrakhan* v. *Gregoire*, 590 F.3d 989, 999-1000, 1015-1016 (9th Cir. 2010) (*Farrakhan II*).

In so holding, the Ninth Circuit noted that Washington had recently amended its disenfranchisement statute to provisionally restore the voting rights of felons upon their release from prison or from community custody (subject to revocation for "willful failure to fulfill all financial obligations imposed as part of [the] sentence"). *Farrakhan II*, 590 F.3d at 1015. The court concluded, however, that the amendment "d[id] not alter [the] anal-

ysis." *Id.* at 1016. The court explained that, "no matter how well the amended law functions to restore at an earlier time the voting rights of felons who have emerged from incarceration, it does not protect minorities from being denied the right to vote upon conviction by a criminal justice system that Plaintiffs have demonstrated is materially tainted by discrimination and bias." *Ibid.*

As petitioners note (Pet. 24-25), the Ninth Circuit's reasoning in *Farrakhan II* is in substantial tension with the court of appeals' conclusion in this case that Section 2 does not invalidate laws that disqualify only currently incarcerated felons from voting. This Court's intervention is not, however, warranted at this time because the Ninth Circuit has agreed to rehear the case en banc. *Farrakhan* v. *Gregoire*, No. 06-35669 (Apr. 28, 2010). The en banc court's decision may eliminate any conflict with the decision below, rendering this Court's intervention unnecessary. If, however, the en banc court's decision does not eliminate the conflict, the Court will likely have the opportunity to consider whether to grant review in that case.

Farrakhan, moreover, would present this Court with the opportunity to address the Section 2 question with the benefit of a fully developed record. Here, by contrast, petitioners have provided no support for their claim that "past practices in the Massachusetts criminal justice system produced inmate populations which, in combination with the disqualification of inmates imprisoned for felonies, have resulted in disproportionate disqualification of minorities from voting." Pet. App. 2a; see also *id.* at 39a n.23 (noting that "[t]his is the situation eight years after [petitioners] filed suit and have

had discovery from defendants").[1] Accordingly, at least until the en banc Ninth Circuit rules in *Farrakhan*, this Court's intervention would be premature.

2. On the merits, the court of appeals in this case reasonably concluded that petitioners' challenge to Article 120, which forbids only currently incarcerated felons from voting, is not actionable under Section 2.

As originally enacted in 1965, Section 2 of the VRA provided: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. 1973 (1970). After this Court interpreted that language to require a showing of discriminatory purpose, see *City of Mobile* v. *Bolden*, 446 U.S. 55, 60-62 (1980), Congress amended the statute in 1982 to "restore the 'results test'—the legal standard that governed voting discrimination cases prior to" *Bolden*. *Thornburg* v. *Gingles*, 478 U.S. 30, 44 n.8 (1986). As amended, Section 2(a) prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure * * * which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. 1973(a); see 42 U.S.C. 1973b(f)(2). Section 2(b), which was added in 1982, provides that "[a] violation of [Section 2(a)] is established if, based on the totality of circumstances, it is shown that * * * members of a

[1] The court of appeals noted that the 1994 Final Report by the Commission to Study Racial and Ethnic Bias in the Courts to the Massachusetts Supreme Judicial Court on which petitioners relied in making this claim "did not conclude that any race bias resulted in minority defendants being sentenced as felons." Pet. App. 10a n.3.

class of citizens protected by [Section 2(a)] * * * have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. 1973(b).

A law that forbids currently incarcerated felons from voting in elections in the State, is, as petitioners emphasize (Pet. 14, 15) a "voting qualification" within the meaning of Section 2(a). But as the court of appeals noted, "it is clear that under the plain terms of the statute, not every 'voter qualification' is actionable under § 2." Pet. App. 21a. Section 2 does not invalidate all voter qualifications that may disproportionately affect members of particular groups, but rather focuses on those that have unjustified disparate effects. Article 120, a neutrally enforced and designed law that prohibits only currently incarcerated felons from voting, is not such a voter qualification. Incarceration, as this Court has often observed, entails "peculiar and restrictive circumstances," and "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (quoting *Price* v. *Johnston*, 334 U.S. 266, 285 (1948)); see also, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S. 539, 555 (1974) ("Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen.").

Moreover, the language of Section 2(b), which describes the "totality of circumstances" test with a particular focus on the plaintiff's "opportunity * * * to participate in the political process," 42 U.S.C. 1973(b), is not naturally read to encompass the claims of incarcerated prisoners who, "[f]or a host of valid reasons, * * * cannot participate in the political process" in the same man-

ner as "free citizens outside the prison walls." Pet. App. 36a.[2] The necessarily restrictive nature of confinement means that prisoners are unable in many ways to fully participate in the political process. Among other limitations on their political activity, inmates may be prohibited from making unmonitored phone calls and may not go door-to-door. See *Hayden*, 449 F.3d at 342 (Jacobs, J., concurring). Moreover, the type of associational activities generally attendant to participating in the political process—meetings and discussions regarding policy issues, debates about particular candidates, attempts to persuade others to one's viewpoint—may raise particular security concerns in the prison context. See *Jones*, 433 U.S. at 132 (citing *Wolff*, 418 U.S. at 561-562).

Given the nature of penal confinement and its accompanying restrictions on a variety of rights necessary to fully participate in the political process, Section 2's general prohibition on discriminatory voting practices does not forbid a neutrally designed and enforced state provision disqualifying incarcerated felons from voting. Petitioners thus cannot demonstrate a violation of Section 2, even if they could ultimately prove that (as they have alleged) African-American and Hispanic defendants are over-represented in the population of Massachusetts incarcerated felons because of "past practices in the Massachusetts criminal justice system." Pet. 15 (quoting Pet. App. 2a); see Pet. App. 17a.

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[2] Although petitioners rely on the language of Section 2(a), see Pet. 12-14, they do not dispute that Section 2(b) sets out the relevant inquiry for evaluating their claim, see Pet. 25. The two subsections in any event cannot be read entirely in isolation from one another. See, *e.g.*, *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("We do not * * * construe statutory phrases in isolation; we read statutes as a whole.").

3. To acknowledge that Article 120 is not subject to challenge under Section 2 of the VRA does not mean, as petitioners suggest (Pet. 24-25), that all felon disenfranchisement laws, including those that can be shown to have an unjustified disparate effect on particular racial groups, are categorically beyond the reach of Section 2. The claim of a currently incarcerated plaintiff, whose imprisonment necessarily carries with it substantial restrictions on his ability to participate in the political process, differs in important ways from the claim of an individual who has fully served his sentence and returned to society. And while the nature of penal confinement suffices to justify a disenfranchisement provision for currently incarcerated felons like Article 120, a lifetime disenfranchisement provision for individuals who have fully served their sentences, for example, would raise different questions under Section 2.

Because this case specifically concerns a law that "is among the narrowest of state felon disenfranchisement provisions," Pet. App. 13a, in that it prohibits felons from voting only during the period of their incarceration, it does not provide a suitable opportunity to consider how Section 2 applies to other kinds of felon disenfranchisement laws. Such laws vary in a number of respects. Some prohibit voting both during the period of incarceration and during parole or probation. *Ibid.*; see, *e.g.*, Cal. Const. Art. 2, § 4; Cal. Election Code § 2101 (West 2003). Some prohibit some or all convicted felons from voting for life, absent a pardon or an individual restoration of rights. Pet. App. 13a; see, *e.g.*, Ky. Const. § 145; Ky. Rev. Stat. Ann. § 116.025 (LexisNexis Supp. 2009); Va. Const. Art. II, § 1. Some laws apply different restrictions depending on the crime of conviction, see, *e.g.*, Ala. Code § 15-22-36.1(g) (LexisNexis Supp. 2009);

Miss. Const. Art. 12, § 241, or the defendant's criminal history, see, *e.g.*, Ariz. Rev. Stat. Ann. § 13-912 (2010); Nev. Rev. Stat. Ann. § 213.157 (LexisNexis 2010).

4. On two earlier occasions, the United States filed briefs as amicus curiae in the courts of appeals that addressed Section 2's application to felon disenfranchisement laws. In an amicus brief filed in *Johnson* v. *Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003), rev'd en banc, 405 F.3d 1214, cert. denied, 546 U.S. 1015 (2005), a challenge to a Florida law disqualifying any person convicted of a felony from voting until restoration of civil rights or removal of disability, the United States did not question Section 2's applicability to felon disenfranchisement laws generally. It took the position that a successful challenge under Section 2's results test requires not only "statistics showing that a facially-neutral practice has a racially disparate effect on minority electoral opportunities," but an inquiry into "whether the current electoral practices interact with effects of past racial discrimination to diminish minorities' 'fair chance to participate' in the electoral process." U.S. Amicus Br. 22-23, *Johnson*, *supra* (No. 02-14469).

Later, in an amicus brief filed in *Muntaqim* v. *Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam), which had been consolidated for briefing and oral argument with *Hayden*, *supra*, the United States addressed the question "[w]hether Section 2 of the VRA applies to [a state statute that] prohibits presently incarcerated felons from voting." U.S. Amicus Br. 5, *Muntaqim*, *supra* (Nos. 01-7260 and 04-3886).[3] The

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[3] The Second Circuit had granted en banc review to consider, *inter alia*, "[w]hether Section 2 of the Voting Rights Act can constitutionally be applied to a state statute * * * that disenfranchises persons

United States took the view that Section 2 "should not be construed as applying to such laws." *Ibid.* The United States emphasized that Section 2 of the Fourteenth Amendment expressly contemplates felon disenfranchisement laws. See U.S. Const. Amend. XIV, § 2 ("[W]hen the right to vote at any [federal] election * * * is denied to any of the male inhabitants of [a] State * * * or in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced."); *Richardson* v. *Ramirez*, 418 U.S. 24, 42-43 (1974). As a consequence, the brief reasoned, "felons have no substantive 'right to vote' except as granted under state law," and therefore "the VRA's reference to standards, practices or procedures that result in a denial or abridgement of that right cannot fairly be read to include felon disenfranchisement laws." *Id.* at 9-10. The brief also argued that the VRA's legislative history demonstrated congressional acceptance of such laws, U.S. Amicus Br. at 11-15, *Muntaqim*, *supra* (Nos. 01-7260 and 04-3886), and that applying the VRA to such laws, where the laws were not motivated by intentional discrimination, would raise serious constitutional questions and would disrupt the federal-state balance in the absence of a clear statement from Congress, *id.* at 15-33.

Insofar as the reasoning of the United States' amicus brief in *Muntaqim* can be extended beyond the question to which that brief was specifically directed—namely, Section 2's application to state laws that "prohibit[] presently incarcerated felons from voting," U.S. Amicus Br. 5, *Muntaqim*, *supra* (Nos. 01-7260 and 04-3886)—

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currently incarcerated as felons and parolees." *Muntaqim* v. *Coombe*, 396 F.3d 95, 95 (2004).

such an extension would be unwarranted. As a textual matter, Section 2 of the Fourteenth Amendment, which "simply states that disenfranchised felons, unlike other persons disenfranchised by the States, are to be included within the census for purposes of apportioning representatives," Pet. App. 67a (Torruella, J., dissenting), does not support the conclusion that all persons convicted of felonies, whether currently imprisoned or returned to society after serving their sentences, have no "right to vote" that is capable of being denied or abridged within the meaning of Section 2. Neither the Second Circuit nor other courts of appeals have adopted that reading of the statute. Moreover, indications that Congress has generally acknowledged the validity of felon disenfranchisement laws do not establish that *all* felon disenfranchisement laws, including those that can be shown to have an unjustified disparate effect on particular racial groups, are categorically beyond the reach of Section 2.

For the reasons explained above, however, the United States adheres to the conclusion that neutrally designed and enforced laws prohibiting currently incarcerated felons from voting are not subject to challenge under Section 2. See pp. 12-13, *supra*. That principle is sufficient to resolve this case.

B. The Ex Post Facto Question Does Not Warrant This Court's Review

This Court's review is not warranted to address whether Article 120 violates the Ex Post Facto Clause as applied to incarcerated felons who committed their offenses before the effective date of the amendment.

1. The framework for determining whether a law "constitutes retroactive punishment forbidden by the *Ex*

Post Facto Clause" is "well established." *Smith* v. *Doe*, 538 U.S. 84, 92 (2003). The court first inquires whether "the intention of the legislature was to impose punishment." *Ibid.* If the legislature's intention was punitive, "that ends the inquiry." *Ibid.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," a court "must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid.* (quoting *Kansas* v. *Hendricks*, 521 U.S. 346, 361 (1997), and *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980)) (internal quotation marks omitted; brackets in original). Because the Court "ordinarily defer[s] to the legislature's stated intent," *ibid.* (quoting *Hendricks*, 521 U.S. at 361), "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *ibid.* (quoting *Hudson* v. *United States*, 522 U.S. 93, 100 (1997), and *Ward*, 448 U.S. at 249).

2. Applying that well-established framework in this case, the court of appeals concluded that Article 120 does not retroactively increase the punishment for crimes committed before its effective date. The court began by noting that, in *Trop* v. *Dulles*, 356 U.S. 86 (1958), this Court described a criminal disenfranchisement provision not enacted for the purpose of punishment as a "nonpenal exercise of the power to regulate the franchise." Pet. App. 43a-44a (quoting *Trop*, 356 U.S. at 96-97). The court observed that Article 120 "on its face" does not describe a criminal penalty, that it is "not in the Commonwealth's criminal code, but rather its civil constitutional and statutory voter qualification provisions," that it is civilly enforced, and that none of the information provided to voters in connection with the

constitutional amendment made mention of "any goal of punishing prisoners." *Id.* at 44a-45a.

Having concluded that Article 120 was intended as a "civil regulatory scheme" rather than an additional penalty for the commission of a crime, the court of appeals, after examining each of the seven factors set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963), concluded that petitioners had failed to show by "the clearest proof" that Article 120 is "so punitive either in purpose or effect as to negate that intention," Pet. App. 45a (quoting *Ward*, 448 U.S. at 248-249).

3. Petitioners contend that this Court's review is warranted to address whether the "clearest proof" standard applies in the absence of "clearly-stated legislative intent to regulate." Pet. 30. This Court has, however, made clear that a legislative intent to regulate, rather than punish, need not be "clearly stated" for purposes of the threshold Ex Post Facto inquiry. This Court has described the inquiry as whether the legislature "indicated either expressly *or impliedly* a preference for one label or the other." *Hudson*, 522 U.S. at 99 (emphasis added). It has, moreover, made clear that "formal attributes of a legislative enactment," such as the placement of the enactment in the State's code, is probative of legislative intent. *Smith*, 538 U.S. at 94; see *Hendricks*, 521 U.S. at 361. The court of appeals properly relied on such evidence in concluding that Article 120 was intended to create a civil, rather than penal, scheme. See Pet. App. 44a. And in reciting the proposition that "'[o]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *id.* at 45a (quot-

ing *Hudson*, 522 U.S. at 100), the court of appeals accurately stated the law.[4]

Petitioners rely on the separate opinions of Members of this Court who have argued that the "clearest proof" standard should not apply when legislative intent is ambiguous. Pet. App. 29 (citing *Smith*, 538 U.S. at 107 (Souter, J., concurring in the judgment), and *id.* at 115 (Ginsburg, J., dissenting)). Even were the Court to adopt that approach, however, it is not clear that it would have any effect on this case. As petitioners acknowledge (Pet. 29), the court of appeals considered petitioners' proffered evidence of punitive intent, but considered the "sporadic" statements of legislators to be both inconclusive as to intent and less probative than the "balanced debate" contained in the information provided to the voters who ultimately were responsible for Article 120's passage. Pet. App. 47a-48a. The court's opinion gives no indication either that it thought the statements on which petitioners relied were sufficient to create ambiguity about the intent underlying Article 120, or that it would have reached a different conclusion about Article 120's purpose and effect had it reviewed the *Mendoza-Martinez* factors under a different standard.

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[4] Petitioners also contend that the court of appeals "defaulted to an inappropriate presumption that what it perceived as the absence of evidence of punitive intent justified a finding of a civil regulatory scheme." Pet. 29-30. The court of appeals, however, after considering the language and nature of Article 120, concluded that Article 120 "on its face" creates a civil regulatory scheme. See Pet. App. 44a-45a. The court's observations that "there is no language indicating the Commonwealth's provision is penal," *id.* at 44a, and that the state Voter Guide "made no mention of any goal of punishing prisoners," *id.* at 45a, do not amount to a holding that the "absence of evidence of punitive intent justifie[s] a finding of a civil regulatory scheme," Pet. 29.

Petitioners contend that the court of appeals erred in its evaluation of the evidence bearing on the penal nature of Article 120. See Pet. 29-30 & n.7 ("Had the court conducted an appropriately rigorous examination, it would have found overriding punitive effect whether employing a preponderance standard or the elevated 'clearest proof' standard."). The court of appeals' case-specific evaluation of the particular circumstances surrounding the enactment of Article 120 does not merit further review. Moreover, to the extent that the Ex Post Facto question in this case presents issues that may be common to the enactment of other felon disenfranchisement laws, such issues are unlikely to be of recurring importance. The decision in this case is, notably, the only court of appeals decision addressing the validity of a newly enacted felon disenfranchisement scheme under the Ex Post Facto Clause. As such, it does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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